No. 21979

United States Court of Appeals for the Ninth Circuit

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Reuben G. Lenske,

Appellant

vs.

F. M. Sercombe, Clerk of the Supreme Court of the State of Oregon; John H. Holloway, Secretary of Oregon State Bar; Lamar Tooze, Jr., Attorney for Oregon State Bar; Wm. M. McAllister, Chief Justice, William C. Perry, Gordon Sloan, Kenneth J. O'Connell, Alfred T. Goodwin, Arno H. Denecke, Ralph M. Holman, Associate Justices, who comprise the Supreme Court of the State of Oregon; James G. Richmond, Philip Hayter, Carrell F. Bradley, John B. Fenner, Alfred F. Cunha, Wendell E. Gronso, Roy Kilpatrick, Herbert C. Hardy, John D. Ryan, Philip A. Levin, John E. Jaqua and Wallace A. Johansen, who comprise the Board of Governors of Oregon State Bar,

Appellees

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APPELLANT'S REPLY BRIEF

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Appeal from the United States District Court for the District of Oregon

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Hon. John F. Kilkenny

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Reuben G. Lenske,
1014 SW 2d Ave.,
Portland, Ore. 97204,
Appellant.

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IN THE UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

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v.

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Appellees

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Appellant's Reply Brief

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No conviction, no disbarment, no more suspension

On page 7 of my opening brief I stated that the trial court started out with the erroneous premise (See first paragraph of court's opinion on page 21 of my opening brief) that I was disbarred. I wish to thank counsel for Appellees for inferentially correcting that error of the court when, on page 7 of Appellees' brief they state that the Circuit Court of Appeals reversed the income tax conviction and that the Oregon Supreme Court "has since lifted the suspension order, thus allowing appellant to again practice law." Now may I correct some of Appellees' errors.

Notice of suspension - due process

In Appellees' summary of facts, page 3 of their brief, they say: "Appellant was notified of the order of suspension (Lenske deposition, pp 9-10)."

Thus, while Appellees contest the jurisdiction of the U.S. District Court to consider the case on its merits and urge that comity among courts should prevent the District Court from taking jurisdiction over the merits if it has the power, nevertheless

Appellees do seek judgment on the merits - but they do that based solely on the evidence presented (not introduced) by t and without giving appellant an opportunity to present evide on his own behalf. Even an admission by a litigant is not co- conclusive until he is given opportunity to deny or explain h mission. I make this "point of law" without reneging from wht said on deposition.

When the court does consider the issue of notice of the pension order as a basis for a criminal judgment of contempt believe the trial court ultimately should, then it must come grips with the legal and constitutional question, "Is an uns and uncertified copy of a letter to the Oregon State Bar by Clerk of the Oregon Supreme Court, unaccompanied by a copy o suspension order, an adequate substitute for service of the of suspension?" And, "Will such substitute for service suppo a conviction for contempt in violating the terms of the susp sion order, if indeed they were violated?"

I submit that such evidence of knowledge of both the en of a suspension order and the terms of the suspension order within the purview of due process be the basis for criminal l lity. The trial court refused to even let me state my positic thought it so preposterous, when I wanted to present to him t issue of whether in my case against Appellees they had suffic notice requiring an answer if it were proved by their own adm in answer to interrogatories, that they were handed copies of complaint and read it. Or would it be sufficient that they ha read about my filing the case against them in the newspapers? Mind you, the notice to me was to determine whether there was basis for putting me in jail and the notice to them was merel to determine whether they should answer my complaint.

I submit that under Oregon law and by any standard of du

process criminal liability cannot attach unless the order and its specific terms are set forth orally by the court in the presence and hearing of the accused or a certified copy of the order is served on the accused. Due process is as much a constitutional requirement between an accusing court and an accused lawyer as it is between two private litigants and when the court is merely a disinterested ajudicator.

The trial court, in its opinion, does not discuss this issue of law and does not say, as Appellees said above, that I was "notified of the order of suspension." It said, "The Oregon State Bar was notified of this suspension by letter, a copy of which was sent to plaintiff." Thus the trial court also considered the merits of the case based on evidence, albeit the evidence was not introduced, but it denied appellant an opportunity to produce evidence, not only on this point, but on the other issues in my complaint.

Who are proper defendants and are they properly named?

At the top of page 5 of their brief Appellees state that I named as defendants merely the individual members of the Supreme Court of Oregon and the members of the Board of Governors of the Oregon State Bar, inferring that the Court itself and the Oregon State Bar are not parties defendant. The trial court says likewise in its opinion, see page 22 of my opening brief. Also, the trial court held that the members of the Board of Governors and the prosecuting attorney and secretary of the Bar are not proper parties. See point 1-3 of the trial court's opinion on the same page and Argument I, pages 9-12 of Appellees' brief.

Appellees and the trial court ignore the fact that the case against me was a criminal case for contempt and that the Board of Bar Governors initiated the contempt proceedings and their attorney prosecuted me and that I alleged in my complaint (See page 19 of my opening brief):

"...defendants have threatened and do now threaten to
imprison plaintiff under an order entered in violatio
the requirements of the laws and constitution of the
United States..."

I am seeking a restraining order against my imprisonm
and it should appear clear to the defendant initiators and
prosecutor that they, as well as the Supreme Court of Oreg
should be restrained from taking the steps that are normal
taken and are necessary to incarcerate me. If they did not
do not threaten to initiate the necessary steps to incarce
me they should so testify and the conclusion of whether th
are or are not necessary or proper parties should then be
decided. As the pleadings now stand they are proper partie
I shall be pleased to have them disprove what I have alleg
and I am aware that a pleading should not contain allegati
which cannot be supported by proof.

I do not dispute the "exclusive jurisdiction" of the
Court of Oregon to "suspend, disbar or reprimand" as state
page 10 of Appellees' brief but it is fair to assume that
the initiatory and prosecutory action of the other defenda
the suspension and the contempt proceedings would not have
taken by the Oregon Supreme Court and the threatened proce
to incarcerate me would also remain unexecuted. Therefore
proper for me to name the initiating malefactors as defend

Did I properly designate the Oregon Supreme Court as

This same type of question was raised in MacEwan v. H
al., 226 Or 27, 359 P2d 413, 85 ALR 2d 1086 (1961).

In that case I sued the Oregon State Board of Health
half of Dr. Alan MacEwan on account of the Board's refusal
mit him to examine the Board's records on nuclear fallout

water, air, etc. I there named the Board and its members in the same manner that I named the Oregon Supreme Court and its members and Board of Bar Governors and its members in this case. The attorneys for the Board of Health in the MacEwan case raised the issue because one of the Board members was replaced. The majority opinion did not dignify the issue by making a specific point out of it; neither did the writers of the dissenting opinions.

Justice O'Connell, who wrote the majority opinion, did say on page 1086 of 85 ALR 2d:

> "Plaintiff brings this suit to require the defendants, who constitute the State Board of Health, to make available to the plaintiff data requested by him relating to nuclear radiation..."
>
> " (Page 1098) In the case at bar the plaintiff's request for data in the possession of the Board was, in practical effect, denied."
>
> "By this action on the part of the Board and its agents the plaintiff was deprived of this right of inspection under our statutes. Therefore the decree of the lower court is reversed and the cause is remanded with directions to enter a decree directing the defendants to permit plaintiff to inspect the records in the custody of defendants..."

The law as administered by the Oregon Supreme Court in that case should be applied in this case.

Does 28 USCA Sec. 2283 deprive the U.S. District Court of jurisdiction?

In my complaint I alleged that the U.S. District Court had jurisdiction under 42 USCA Sec. 1983, among other sections of the code. I neglected to mention that in my opening brief but counsel for Appellees were good enough to point that out in their brief. However, they point out under point II of their brief, page 12, that they contend that 28 USCA Sec. 2283 prohibits the injunction feature of this suit.

They quote 28 USCA 2283 and 42 USCA 1983 on page 13 of thei

They fail to analyze or consider Dombrowski v. Pfister 380 U.S. 479, 486, 489 or the note in 10 ALR 3d 727-794 and the numerous cases analyzed therein. They do, however, cite Cooper v. Hutchinson, 184 F2d 119, 124 (3 Cir, 1950) along with only one case, (see page 14 of appellees' brief) which has some similarity to this case. However, the princi set forth in the Dombrowski case by the United States Supre Court should control. I do not believe counsel for appellee themselves are convinced of the merit of their point II. They are more enthused over their point III commencing on page 16 of their brief.

Should the United States courts decline to take jurisdiction on grounds of comity and res judicata?

The question of res judicata cannot, of course, be deter until the U. S. court takes jurisdiction and makes its deter tion based on the facts and law. We are therefore left with the issue of comity. Before I go into that let me point out again that the trial court and appellees rely on evidenciary facts for their conclusions, facts not tested by evidence tha I wished to adduce. On page 16 of their brief appellees stat

> "The Supreme Court of Oregon suspended appellant from th practice of law. Subsequently, he practiced law and was adjudged in contempt of court."

Thus they say that I practiced law as a final fact. I alleged in paragraph VIII of my complaint, page 18 of my open brief, that I was found guilty of contempt merely for excerci my right under the First Amendment to the U. S. constitution, right available to any citizen. No evidence was introduced to prove the issue. This points up the trap frequently set by parties and courts for themselves in denying a full hearing o

the merits. While I believe that the opinion of the Supreme Court of Oregon that convicted me shows on its face that what I did was not practicing law, the basic question for the U. S. Court to decide is whether the Supreme Court of Oregon denied me the basic constitutional rights I claim in my complaint. It must be borne in mind that the Supreme Court was not acting as an appellate court but as a trial court. This brings us to the subpoint of:

The sufficiency of the complaint

The trial court on page 611 of 206 F.Supp. or page 22 of my opening brief says, "the total insufficiency of the complaint" could have been the basis of its decision. On March 21-23 600 members of the Oregon Bar attended a Federal Court Practice education conference. Judge Gus Solomon, chief judge of the U. S. District Court for Oregon made the clearcut statement to all 600 attendants that under our practice a complaint does not have to state a cause of action or suit. Present there as speakers were William Luck, Clerk of the U. S. Court of Appeals for the Ninth Circuit and Judge Ben Duniway of that court. Neither of the latter disagreed with Judge Solomon. The whole import of trial and pretrial procedure was that the complaint did not count, that pretrial conferences resulting in a pretrial order determined the issues, in which case the previous pleadings were eliminated. Why wasn't the usual practice followed in this case?

In a small but analogous way the shutting me up at appearance before the trial court, the court's statement about the "insufficiency of the complaint," and finally the granting of summary dismissal after denying me the right to answers to my interrogatories, are what the U. S. Supreme Court talked about in Sheppard v. Maxwell, 384 US 333, 16 L ed 2d 600, 86 S Ct. 1507.

The court said at page 349:

"The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-Americ distrust for secret trials."

"(page 351) The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago i Patterson v. Colorado, 205 US 454, 462, 51 L ed 879, 88 27 S Ct 556 (1907):

'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence whether of private talk or public print.'

"(Page 352) Only last term in Estes v Texas, 381 US 532, 14 L ed 2d 543, 85 S Ct 1628 (1965), we set aside a conviction despite the absence of any showing of prejudice.. said there:

'It is true that in most cases involving claims of due process deprivations we require a showing of identifiabl prejudice to the accused. Nevertheless, at times a proce will result that it is deemed inherently lacking in due

"And we cited with approval the language of Mr. Justice for the Court in In re Murchison, 349 US 133, 136, 99 L 946, 75 S Ct 623 (1955), that 'our system of law has alw endeavored to prevent even the probability of unfairness.

In my complaint I alleged numerous basic violations by th Court that convicted me, of constitutional guarantees under th U. S. constitution. No spirit of comity or comraderie should d prive me of the right or the adjudicators of my guilt the resp sibility to permit those allegations to be tested by the light evidence. I ask this court not to take as religious orthodox g pel that which the trial court said in its opinion and that wh the Oregon Supreme Court said in its opinions. These are state of fallible men, not infallible Gods. The evidence and its cor tion to the constitution should control, not comity.

Respectfully submitted,